

# Dispute Boards: A Different Approach to Dispute Resolution

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## Introduction

With the signing of the United Nations Convention on International Settlement Agreements Resulting from Mediation in August 2019,<sup>2</sup> there has been a newfound focus on how parties can improve and expand the use of alternative forms of dispute resolution outside conventional litigation and arbitration proceedings.

Indeed, among the principal goals of the Singapore Convention on Mediation is to expand and standardize the use of mediation in jurisdictions around the world.<sup>3</sup> In doing so, the Singapore Convention on Mediation raises the question of whether other, slightly less familiar, forms of alternative dispute resolution might be adaptable to larger numbers of jurisdictions and industries. In that vein, this article seeks to introduce another form of alternative dispute resolution, common to the construction industry, to a wider audience — “dispute boards”.

While dispute boards can take a wide variety of forms, they typically involve a three-member panel of impartial individuals (usually subject matter experts or attorneys) whose goal is to assist parties to resolve construction-related disputes without the need to resort to litigation or arbitration.

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2 United Nations Convention on International Settlement Agreements Resulting from Mediation, 7 August 2019, General Assembly Resolution 73/198 (11 January 2019).

3 United Nations Convention on International Settlement Agreements Resulting from Mediation, 7 August 2019, General Assembly Resolution 73/198, Preamble (11 January 2019).

Dispute boards can serve a variety of roles on a project, ranging from proactive mediators, empowered to identify and aid the parties to avoid disputes, to more formal arbiters, empowered to issue formal binding determinations in connection with project level claims. As a result, dispute boards offer parties something akin to a hybrid dispute resolution method that lands somewhere between formalized arbitration and mediation. The flexible roles that dispute boards can play on international construction projects has made them attractive to many within the construction industry.

Dispute boards, however, are not without their disadvantages. For one, they can be costly and, as a result, may not be appropriate for all construction projects or contractual relationships. Separately, dispute board procedures can be susceptible to gamesmanship and recommendations/ decisions issued by dispute boards may be easily avoided. As result, some may question the utility of having their case heard by a dispute board if the losing party is not ultimately required to follow the board's decision.

Notwithstanding the above, dispute boards have existed for the better part of the last fifty years and have grown in popularity among owners and contractors, particularly on large, international construction projects. Indeed, a large number of standard form construction agreements, including the arguably most popular standard form international construction agreements from the *Fédération Internationale Des Ingénieurs-Conseils* (FIDIC), have included dispute boards as conditions precedent to formal arbitration.<sup>4</sup>

Although uniquely suited to the complex world of construction disputes, dispute boards represent a practice that might be adapted to other forms of disputes and industries. As a result, in addition to introducing dispute board practices to a wider audience, the authors will explore the contexts in which a dispute board might be utilized outside the construction industry.

This article is organized as follows: First, it introduces the concept of dispute boards on international construction projects. Second, it summarizes the history of how dispute boards have evolved over the past fifty years. Third, it explains the basic procedural framework of dispute boards. Fourth, it identifies the most common issues related to the use of dispute boards. Fifth, it explores whether dispute boards might be adopted by other industries.

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<sup>4</sup> See, e.g., FIDIC, *Conditions of Contract for EPC/Turnkey Projects, Second Edition* 2017, Sub-Clause 21 [Disputes and Arbitration].

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## International Construction Disputes and Dispute Boards

International construction projects represent long-term, complex, and often multi-tiered relationships, where the parties involved commonly place millions, if not billions, of dollars at stake to execute highly technical engineering projects in a foreign country. These challenges mean that disputes on international construction projects, big or small, are nearly inevitable. Indeed, while parties attempt to allocate the risk associated with these projects through contract, unanticipated events often arise that impact ongoing work.

But what makes international construction project disputes unique? While it is true that, at their core, these disputes generally involve breach of contract claims where one party accuses the other of failing to live up to their end of the bargain; however, international construction projects raise nuanced issues that are often uncommon to other contractual relationships.<sup>5</sup>

For one, international construction projects commonly involve hundreds, if not thousands, of highly technical engineering disputes that could constitute individual arbitrations/trials in their own right. Many of these individual claims are relatively small, but taken together can have significant impacts on both the project's costs and time for completion.

Separately, because international construction projects often involve long-term relationships, disputes typically arise during the course of an ongoing project. As a result, the need to quickly resolve disputes without disrupting the project is critical.

Lastly, the context behind an international construction project means that parties are commonly reluctant to refer their disputes to the local courts. Indeed, setting aside the significant cost implications associated with litigating each and every minor claim, parties commonly fear that foreign courts lack the appropriate expertise and neutrality to adequately resolve construction claims.

Given the above, there is an inherent need to quickly, efficiently, and credibly address disputes as they arise to avoid disrupting the ongoing project. To do so, while parties are commonly able to resolve low-level disputes through commercial negotiations, as explained below, the construction industry has developed an interim dispute resolution method

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<sup>5</sup> See, generally, Jenkins, "Chapter 1 — Introduction, §1.01 What is Special About International Construction Disputes?", *International Construction Arbitration Law* (2d Ed., 2014).

known as “dispute boards” as a means of resolving project level disputes without the need to resort to conventional forms of litigation and arbitration.

The term “dispute board” is a generic term that is generally used to describe a panel of three independent and impartial persons selected by the contracting parties to resolve project level disputes prior to formal arbitration or litigation.<sup>6</sup> Dispute boards are created by agreement of the parties and attempt to facilitate the resolution of disputes by either mediating issues that arise during an extended project or adjudicating more contentious disputes. In many cases, though not all, dispute boards are appointed at the outset of a project and maintain a periodic presence on the site.

There are a number of different forms of dispute boards; however, the most common include (i) “dispute review boards”, that offer non-binding recommendations concerning project disputes, (ii) “dispute adjudication boards”, that offer interim binding determinations to project disputes, and (iii) “combined dispute boards”, a hybrid that can offer both informal counseling to the parties and formal recommendations/decisions regarding disputes.<sup>7</sup> On high value infrastructure projects of significant durations, dispute boards can be a cost-effective method for resolving project disputes without souring project level relationships or disrupting the progress of the work.<sup>8</sup>

On one hand, a readily available panel of experts who are well versed in the nuance of a specific project may moderate the parties’ positions and facilitate compromise. Parties are often less willing to take extreme positions before dispute boards because the board members are commonly capable of parsing through highly technical issues given their backgrounds and familiarity with the project. Moreover, because dispute boards are often engaged for the duration of the project, a party’s decision to take extreme positions could risk losing long-term credibility with the dispute board.<sup>9</sup>

Relatedly, the dispute board members’ expertise and familiarity with the project often facilitates confidence by the parties that the dispute board

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<sup>6</sup> See, generally, Chern, *Chern on Dispute Boards* (2008).

<sup>7</sup> See, generally, *International Chamber of Commerce, Dispute Board Rules*, in force as from 1 October 2015, with Appendices in force as from 1 October 2018 (2018), at pp. 14–19 (generally describing the three forms of dispute boards).

<sup>8</sup> See, generally, Hinchey, Prats, Wilburn, “Chapter 10: Construction Dispute Resolution”, *International Construction Law: A Guide for Cross Border Transactions and Legal Disputes* (2009), at pp. 253–263; Klee, “Chapter 11: Construction Dispute Boards”, *International Construction Contract Law*, at pp. 244–245.

<sup>9</sup> See Hinchey, Prats, Wilburn, “Chapter 10: Construction Dispute Resolution”, *International Construction Law: A Guide for Cross Border Transactions and Legal Disputes* (2009), at pp. 255–256 (2009).

will fairly and carefully address the parties' concerns. In doing so, parties may be more willing to accept dispute board decisions — even unfavorable ones. Indeed, while there are a number of factors at play, statistics suggest that binding dispute board decisions are rarely challenged in subsequent litigation or arbitration.<sup>10</sup>

Dispute boards also offer the advantage of ensuring that contentious disputes, with significant cost and time ramifications, can be resolved in real time — limiting the risk that a contractor/subcontractor/supplier could suffer severe cash flow limitations associated with protracted disputes. Specifically, during construction disputes, owners commonly withhold payment from contractors when the owner believes it has been injured by the contractor and must withhold payment to protect itself from loss. Because contractors commonly rely on the cash flows generated by the project payment process to finance its efforts, the owner's decision to withhold payment often forces the contractor to fund the project on its own. In cases of protracted disputes, the contractor could be forced to finance its operations on its own for significant durations.

When the value of the withholding is substantial, protracted disputes can jeopardize not only the project, but also the financial health of the contractor and its subcontractors. In theory, dispute boards allow parties to quickly resolve these issues and ensure that the contractor secures the much needed payment for any meritorious claims.

Lastly, because dispute boards represent a less formal process that does not necessarily require the direct involvement of outside attorneys and experts, the cost of resolving a dispute is significantly less than conventional arbitration or litigation. As a result, dispute boards provide parties a forum to resolve low value disputes that might otherwise make little economic sense in a litigation or arbitral forum. Although parties commonly present a number of disputes to a dispute board at a time, dispute boards limit the need to aggregate large numbers of claims until they reach a value that would justify arbitration or litigation.

That said, as many point out, dispute boards are not without their drawbacks. For one, dispute boards can be significant cost centers and while they aim to save the project money, they do not, in and of themselves, generate revenues. Standing dispute boards often require the contracting parties to pay the fees and expenses associated with three professional engineers or attorneys to travel to the project site on a

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<sup>10</sup> See Harmon, "Effectiveness of Dispute Review Boards", *J. Construction Eng. & Management* (2003); See, generally, Dispute Resolution Board Foundation, "Concept: Introduction and Development of the DRB Concept", *DRBF Practices and Procedures* (2007).

periodic basis and oversee complex technical disputes. While the overarching costs of a dispute board are probably less than an arbitral tribunal in a formal arbitration proceeding, they are not inconsequential. As a result, if only sparingly utilized, dispute boards may not be worth the expense.

Some also argue that there is a risk that the dispute board members, especially engineers who lack formal legal training, can disregard the requirements of a contract in favor of their own sense of equity and judgment.<sup>11</sup>

Finally, and possibly most problematically, dispute board decisions, whether binding or not, are relatively easy to ignore and difficult to enforce. For example, even if a dispute board issues a binding determination, it is common for construction contracts to allow either party to challenge the determination within a set period of time and take the dispute to arbitration or litigation.<sup>12</sup>

Moreover, binding dispute board determinations, even if not challenged, cannot be enforced by an arbitral tribunal or court like an arbitration award would be under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e., the New York Convention).<sup>13</sup> As a result, some view dispute boards as an additional, and costly, step in the process of ultimately obtaining a binding and enforceable decision.

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## History of Dispute Boards

Over recent decades, disputes boards have become commonplace among international construction projects. After originating in the United States during the 1960s and 1970s, dispute boards have slowly evolved from a novel form of alternative dispute resolution to a highly professionalized industry.

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11 See Hinchey, Prats, Wilburn, "Chapter 10: Construction Dispute Resolution", *International Construction Law: A Guide for Cross Border Transactions and Legal Disputes*, at p. 256 (2009).

12 See, e.g., FIDIC, Conditions of Contract for EPC/Turnkey Projects ("Silver Book"), Sub-Clause 21 [Disputes and Arbitration]; Sub-Clause 21.4.4 [*Dissatisfaction with DAAB's decision*] (2017); Goodrich, *Dispute Adjudication Boards: Are they the future of dispute resolution?* (6 September 2016) available at <https://www.whitecase.com/publications/article/dispute-adjudication-boards-are-they-future-dispute-resolution> ("On the other hand, there are also projects in which one or both parties simply serves a notice of dissatisfaction to every DAB decision as a matter of course.")

13 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 UST 2517, TIAS No. 6997, 330 UNTS 38.

While the history of dispute boards has been well worn in other journals and publications,<sup>14</sup> as explained below, the evolution of dispute boards demonstrates a trend within the international construction industry to move away from formalized binding interim decisions to more flexible and informal mediation-like dispute resolution procedures.

The first reported use of a dispute board was on the Boundary Dam in Washington State during the 1960s, where the parties implemented a “Joint Consulting Board” to make decisions regarding project level disputes.<sup>15</sup> Thereafter, organizations in the United States, including the National Committee for Tunneling Practices, began to study claims management practices and the adverse effects that intractable disputes could have on infrastructure project execution.<sup>16</sup>

As a result of this research, a dispute review board — empowered to issue non-binding recommendations related to project disputes — was established on the Eisenhower Tunnel in Colorado and proved highly successful.<sup>17</sup> The dispute review board on the Eisenhower Tunnel project heard three significant disputes during the course of the project and each of the dispute review board’s recommendations were accepted.<sup>18</sup> Many credit the success of the dispute review board on the Eisenhower Tunnel project for popularizing the use of dispute boards across the United States and internationally.<sup>19</sup>

Indeed, shortly after the completion of the Eisenhower Tunnel, international construction projects began to experiment with varying forms

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14 See, e.g., Chern, *Chern on Dispute Boards*, at pp 8–10 (2008); Goodrich, *Dispute Adjudication Boards: Are they the future of dispute resolution?* (6 September 2016) available at <https://www.whitecase.com/publications/article/dispute-adjudication-boards-are-they-future-dispute-resolution>; Hinchey, Prats, Wilburn, “Chapter 10: Construction Dispute Resolution”, *International Construction Law: A Guide for Cross Border Transactions and Legal Disputes*, at pp. 253–254 (2009); Dispute Resolution Board Foundation, “Concept: Introduction and Development of the DRB Concept”, *DRBF Practices and Procedures*, at pp. 1–2 (January 2007).

15 Chern, *Chern on Dispute Boards*, 8 (2008); Dispute Resolution Board Foundation, “Concept: Introduction and Development of the DRB Concept”, *DRBF Practices and Procedures*, at p. 1 (January 2007).

16 Dispute Resolution Board Foundation, “Concept: Introduction and Development of the DRB Concept”, *DRBF Practices and Procedures*, at pp. 1–2 (January 2007).

17 Chern, *Chern on Dispute Boards*, at pp 8–9 (2008); Dispute Resolution Board Foundation, “Concept: Introduction and Development of the DRB Concept”, *DRBF Practices and Procedures*, at pp. 1–2 (January 2007).

18 Dispute Resolution Board Foundation, “Concept: Introduction and Development of the DRB Concept”, *DRBF Practices and Procedures*, at pp. 1–2 (January 2007).

19 Chern, *Chern on Dispute Boards*, at pp 8–9 (2008); Goodrich, *Dispute Adjudication Boards: Are they the future of dispute resolution?* (6 September 2016) available at <https://www.whitecase.com/publications/article/dispute-adjudication-boards-are-they-future-dispute-resolution>.

of dispute boards — the first major example being the El Cajon Dam and hydroelectric facility in Honduras.<sup>20</sup> The El Cajon Dam project was partially financed by the U.S.-based World Bank that, having noticed the success of the Eisenhower Tunnel project, insisted that the El Cajon Dam similarly implement a dispute review board. This was particularly so given that the project involved a Swiss engineer, an Italian contractor, and a Honduran owner — that had never managed such a large project or utilized internationally-based contractors. World Bank representatives believed that a dispute review board would help to curtail the effects that disputes might have on the overall execution of the project.<sup>21</sup>

At approximately the same time, other international jurisdictions began to experiment with similar dispute board mechanisms. For example, in the 1990s, infrastructure contracts in Hong Kong began to adopt “dispute resolution advisors” — effectively a one-member standing dispute board — with success.<sup>22</sup>

Given the growing popularity of dispute boards on international construction projects, and their ability to prevent disputes from escalating to formal litigation and arbitration, international financial institutions, such as the World Bank, interested in identifying methods to reduce dispute-related project risks, began to encourage the use of dispute boards in their contracts.<sup>23</sup> Specifically, in the 1990s the World Bank published its *Standard Bidding Document Procurement of Works*, which utilized a modified version of a FIDIC general conditions contract that included provisions for dispute review boards.<sup>24</sup>

Noting the popularity of dispute boards among some of its key users, FIDIC, one of the more popular form construction agreements on international projects, altered their design-build general conditions in

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20 Chern, *Chern on Dispute Boards*, at pp 8–9 (2008); Goodrich, *Dispute Adjudication Boards: Are they the future of dispute resolution?* (6 September 2016) available at <https://www.whitecase.com/publications/article/dispute-adjudication-boards-are-they-future-dispute-resolution>.

21 Chern, *Chern on Dispute Boards*, at pp. 8–9 (2008); Goodrich, *Dispute Adjudication Boards: Are they the future of dispute resolution?* (6 September 2016) available at <https://www.whitecase.com/publications/article/dispute-adjudication-boards-are-they-future-dispute-resolution>.

22 Hinchey, Prats, Wilburn, “Chapter 10: Construction Dispute Resolution”, *International Construction Law: A Guide for Cross Border Transactions and Legal Disputes*, at p. 254 (2009); Luk & Wong, “Dispute Resolution Advisor as an ADR Method in Hong Kong Construction Disputes”, *AAA Handbook on Construction Arbitration and ADR*, at pp. 293–297 (2007).

23 World Bank, *Standard Bidding Documents Procurement of Works*, Washington DC: World Bank (1995).

24 World Bank, *Standard Bidding Documents Procurement of Works*, Washington DC: World Bank (1995); see also Chern, *Chern on Dispute Boards*, at p. 9 (2008).

1995 to include a provision for dispute adjudication boards (also referred to as “DABs”).<sup>25</sup>

However, FIDIC’s modified dispute resolution provisions broke from the more common dispute review board model — dispute boards confined to issuing non-binding resolutions — in favor of the dispute adjudication board approach — boards that could issue binding decisions.<sup>26</sup> While dispute review boards continue to be used throughout the world, FIDIC’s adoption of the dispute adjudication board model promoted the use of DABs on international projects for several decades.

Indeed, in 1999, FIDIC further solidified its preference toward dispute adjudication boards by incorporating DABs into each of their most popular form contracts — the FIDIC Red, Yellow, and Silver books.<sup>27</sup>

Since the 2000s, dispute boards have served a prominent role on international construction projects. Over this period, multiple organizations such as the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), and Dispute Resolution Board Foundation (DRBF), have experimented with dispute boards and fashioned new procedures aimed at limiting delays, lowering costs, and avoiding intractable disputes.<sup>28</sup>

As part of this process, the concept of “Combined Dispute Boards” emerged — a hybrid dispute board model combining the non-binding, conciliatory approach of dispute review boards with the binding, more adversarial approach, of dispute adjudication boards.<sup>29</sup> This new dispute board model proved so popular that in 2017, as part of FIDIC’s 2017 update to its rainbow suite of contracts, FIDIC replaced the old dispute adjudication boards with a new “dispute avoidance/adjudication board” (DAAB).<sup>30</sup> According to FIDIC, the new DAAB would be capable of

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<sup>25</sup> FIDIC, *Design-Build and Turnkey* (1st Ed. 1995).

<sup>26</sup> Chern, *Chern on Dispute Boards*, at p. 9 (2008).

<sup>27</sup> FIDIC, *Conditions of Contract for Construction For Building and Engineering Works Designed by the Employer* (“Red Book”) (1999); FIDIC, *Conditions of Contract for Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor* (“Yellow Book”) (1999); FIDIC, *Conditions of Contract for EPC/Turnkey Projects* (“Silver Book”) (1999).

<sup>28</sup> International Chamber of Commerce, *Dispute Board Rules, in Force from 1 October 2015, with Appendices in force as from October 2018* (2018); American Arbitration Association, *AAA Dispute Resolution Board Guide Specifications* (2000); Dispute Resolution Board Foundation, *Practices & Procedures Manual* (January 2007).

<sup>29</sup> See, e.g., International Chamber of Commerce, *Dispute Board Rules, in Force from 1 October 2015, with Appendices in force as from October 2018*, 19 (2018).

<sup>30</sup> FIDIC, *Conditions of Contract for Construction For Building and Engineering Works Designed by the Employer* (“Red Book”) (2017); FIDIC, *Conditions of Contract For Electrical and Mechanical Plant, and For Building and Engineering Works, Designed by the Contractor* (“Yellow Book”) (2017); FIDIC, *Conditions of Contract for EPC/Turnkey Projects* (“Silver Book”) (2017).

offering both early/informal assistance to avoid disputes along with binding decisions as needed.<sup>31</sup>

The 2017 revisions to the FIDIC rainbow suite and adoption of the DAAB model (or combined dispute board model) marked a shift in the development of dispute board practices and an expansion of the role dispute boards can play on international infrastructure projects. While dispute boards had historically focused their efforts on resolving disputes that the parties formally referred to the dispute board, FIDIC and other organizations have recognized the benefits dispute boards might provide through early and informal engagement with the parties.

While dispute board practices will undoubtedly continue to evolve, and although many continue to utilize dispute review or dispute adjudication board models, the most recent iteration of dispute boards — and its emphasis on early dispute avoidance — reflects a shift in practice.

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## Practice and Procedure of Dispute Boards

### In General

Practices and procedures related to dispute boards vary widely among projects. However, there are a number of key features that dispute boards commonly retain. The following section describes those features and explains the factors parties must consider when deciding how to utilize a dispute board.

### Source of Rules

Dispute boards are creatures of contract that are frequently incorporated into the dispute resolution clauses of construction agreements and function, in many ways, like a standard arbitration clause. In fact, much like arbitration agreements that select specific institutional arbitration rules, dispute board provisions may also specify administered rules/procedures from entities such as FIDIC, the ICC, AAA, and so on.

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<sup>31</sup> See FIDIC, *Conditions of Contract for Construction For Building and Engineering Works Designed by the Employer* (“Red Book”) (2017); FIDIC, *Conditions of Contract For Electrical and Mechanical Plant, and For Building and Engineering Works, Designed by the Contractor* (“Yellow Book”) (2017); FIDIC, *Conditions of Contract for EPC/Turnkey Projects* (“Silver Book”) (2017), at Clause 21 [Disputes and Arbitration].

For example, below is the standard dispute board clause for a combined dispute board administered by the ICC:

“The Parties hereby agree to establish a Combined Dispute Board (CDB) in accordance with the Dispute Board Rules of the International Chamber of Commerce (the “Rules”), which are incorporated herein by reference. The CDB shall have [one/three/X] member[s] appointed in this Contract or appointed pursuant to the Rules.

All disputes arising out of or in connection with the present Contract shall be submitted, in the first instance, to the CDB in accordance with the Rules. For any given dispute, the CDB shall issue a Recommendation unless the Parties agree that it shall render a Decision or it decides to do so upon the request of a Party and in accordance with the Rules.

If any Party fails to comply with a Recommendation or a Decision, when required to do so pursuant to the Rules, the other Party may refer the failure itself — without having to refer it to the CDB first — to arbitration under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration. A Party that has failed to comply with a Recommendation or a Decision, when required to do so pursuant to the Rules, shall not raise any issue as to the merits of the Recommendation or the Decision as a defence to its failure to comply without delay with the Recommendation or the Decision.

If any Party sends a written notice to the other Party and the CDB expressing its dissatisfaction with a Recommendation or a Decision, as provided in the Rules, or if the CDB does not issue the Recommendation or the Decision within the time limit provided in the Rules, or if the CDB is disbanded pursuant to the Rules prior to issuing the Recommendation or the Decision, the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.”<sup>32</sup>

There is no obligation for parties to utilize a specific set of administered dispute board procedures and, in some cases, parties may require even

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<sup>32</sup> International Chamber of Commerce, *Dispute Board Rules, In Force from 1 October 2015, with Appendices in force as from October 2018*, 8 (2018).

more flexibility in fashioning the dispute board process than would be allowed by these institutional rules. However, in most cases, institutional rules will help to ensure that a dispute board functions efficiently and appropriately. While similar, each set of procedures contains its own novel approaches, so users would be well served to understand what these procedures call for before incorporating them into their agreement.<sup>33</sup>

## Role of the Dispute Board

### *In General*

Although dispute boards have evolved over time, modern dispute boards take on one of two non-exclusive roles: (i) early dispute avoidance through informal assistance or (ii) formal dispute adjudication through binding or non-binding decisions.

### *Early Dispute Avoidance*

While the historical role of dispute boards was to serve as a formal adjudicator, where disputes were formally referred to the board for a final decision or recommendation (binding or non-binding), the current trend among dispute boards is to focus on early dispute identification and avoidance. The novelty of FIDIC's "DAABs", the ICC's "Combined Dispute Boards", or even the NEC4's "Dispute Avoidance Board", is to permit the dispute board to become involved in the project early and often, and enable those boards, through their interactions with the parties,

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<sup>33</sup> See, generally, Jenkins, "Dispute Boards", *International Construction Arbitration*, § 5.05 (2014); see also *Dispute Resolution Board Foundation, Practices & Procedures Manual, Section 2, Appendix 2A, Guide Specification* (January 2007); FIDIC, *Conditions of Contract for Construction For Building and Engineering Works Designed by the Employer* ("Red Book"), Article 20 [Claim, Disputes and Arbitration], Appendix General Conditions of Dispute Adjudication Agreement, Annex Procedural Rules (1999) FIDIC, *Conditions of Contract for EPC/Turnkey Projects* ("Silver Book"), Article 20 [Claim, Disputes and Arbitration], Appendix General Conditions of Dispute Adjudication Agreement, Annex Procedural Rules (1999); FIDIC, *Conditions of Contract for EPC/Turnkey Projects* ("Silver Book"), Article 21 [Disputes and Arbitration], Appendix General Conditions of Dispute Avoidance/Adjudication Agreement, Annex DAAB Procedural Rules, Rule 2 [Avoidance of Disputes] (2017); International Chamber of Commerce, *Dispute Board Rules, In Force from 1 October 2015, with Appendices in force as from October 2018*, 19 (2018); NEC4, *Engineering and Construction Contract, Option W3*, at pp. 52–53 (2017); American Arbitration Association, *AAA Dispute Resolution Board Guide Specifications* (2000); Chartered Institute of Arbitrators, *Dispute Board Rules* (August 2014); World Bank, *Standard Bidding Documents Procurement of Works*, Washington DC: World Bank, 154 (July 2019); Institution of Civil Engineers, *ICE Dispute Board Procedure* (April 2012).

to identify and resolve disputes without the need for any formal recommendation or decision.<sup>34</sup>

For example, according to Rule 2 of FIDIC's DAAB Procedural Rules: "the DAAB . . . may give Informal Assistance during discussions at any meeting with the Parties (whether face-to-face or by telephone or by video conference) or at any Site visit or by any informal written note to the parties."<sup>35</sup> Articles 16 and 17 of the ICC's Dispute Board Procedures contain similar practices.<sup>36</sup>

Early dispute avoidance is intended to empower dispute boards to readily seek out and facilitate discussions about issues that the dispute board or parties feel are ripe grounds for dispute. In theory, the process should promote open communications and foster a more cooperative environment as opposed to an adversarial setting. The third-party neutral body of experts can serve as a sounding board for parties and can help prevent the parties from taking entrenched positions.

However, given the novelty of early dispute avoidance procedures, they remain relatively untested. Whether dispute boards or parties take advantage of the early dispute avoidance features of DAABs or Combined Dispute Boards remain to be seen. Moreover, there might be reasonable concerns over whether a dispute board, with the ability to engage in early dispute avoidance, can remain impartial if, in fact, it receives a formal dispute referral on a matter for which the dispute board previously issued informal advice. From a cynical perspective, a dispute board that already made up its mind on a particular matter might render the formal dispute adjudication/recommendation process pointless.

Indeed, some standard form contracts, such as the NEC4, have practically done away entirely with three-member dispute adjudication boards in favor of early dispute resolution procedures.<sup>37</sup> On the other hand, a formal dispute adjudication/recommendation process might permit the dispute board to review evidence and consider arguments that the parties had not previously ventilated.

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<sup>34</sup> See, e.g., FIDIC, *Conditions of Contract for EPC/Turnkey Projects* ("Silver Book"), Sub-Clause 21.3 [Avoidance of Disputes] (2017); International Chamber of Commerce, *Dispute Board Rules, In Force from 1 October 2015, with Appendices in force as from October 2018*, 19 (2018); NEC4, *Engineering and Construction Contract, Option W3*, at pp. 52–53 (2017).

<sup>35</sup> See, e.g., FIDIC, *Conditions of Contract for EPC/Turnkey Projects* ("Silver Book"), Annex DAAB Procedural Rules, Rule 2 [Avoidance of Disputes] (2017).

<sup>36</sup> International Chamber of Commerce, *Dispute Board Rules, in Force from 1 October 2015, with Appendices in force as from October 2018*, 30 (2018).

<sup>37</sup> NEC4, *Engineering and Construction Contract, Option W3*, at pp. 52–53 (2017).

*Formal Dispute Adjudicator*

Where early dispute resolution proves unsuccessful or where dispute boards are not empowered to engage in early dispute avoidance practices (as is the case for some dispute board rules), dispute boards will fill the role of an interim dispute adjudicator where the panel can issue a formal decision/recommendation on the merits of the dispute. These procedures, while less formal than courtroom litigation or arbitration, function in large part like mini-arbitrations that commonly require hearings, written submissions, and sometimes witness or expert testimony.<sup>38</sup> Historically, formal dispute board decisions take one of two forms: non-binding recommendations or interim binding determinations.<sup>39</sup>

Under the dispute review board format — the model more commonly followed by U.S. rules and projects — after hearing the parties' respective cases, the dispute board will issue a non-binding recommendation concerning its assessment of the merits of the dispute.<sup>40</sup> Although the parties are not obligated to follow the recommendation, in concept, the decision may facilitate some form of settlement between the parties. Moreover, in the event the parties proceed to arbitration or litigation, the recommendation can be used as strong evidence on the merits — even though the court or tribunal will not necessarily be bound by the decision.<sup>41</sup>

Under the dispute *adjudication* board model, the model used in the 1999 editions of the FIDIC rainbow suit of contracts, following a DAB hearing, the board is entitled to issue an interim binding determination on the merits.<sup>42</sup> When such a decision is issued, the parties are obligated to comply with the determination.<sup>43</sup> However, as a practical matter, if the losing party issues a notice of dissatisfaction within the requisite period

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38 See, e.g., FIDIC, *Conditions of Contract for EPC/Turnkey Projects* ("Silver Book"), Annex DAAB Procedural Rules (2017); Chern, *Chern on Dispute Boards*, at pp. 185–222 (2008).

39 Compare American Arbitration Association, *AAA Dispute Resolution Board Guide Specifications* (2000); FIDIC, *Conditions of Contract for Construction For Building and Engineering Works Designed by the Employer* ("Red Book") (1999); Chern, *Chern on Dispute Boards*, at pp. 4–5 (2008).

40 See Dispute Resolution Board Foundation, *The Report, DRFB Practices and Procedures*, at pp. 1–2 (2007); American Arbitration Association, *AAA Dispute Resolution Board Guide Specifications* (2000).

41 See also Chern, *Chern on Dispute Boards*, at p. 4 (2008).

42 FIDIC, *Conditions of Contract for Construction For Building and Engineering Works Designed by the Employer* ("Red Book") (1999); FIDIC, *Conditions of Contract For Electrical and Mechanical Plant, and For Building and Engineering Works, Designed by the Contractor* ("Yellow Book") (1999); FIDIC, *Conditions of Contract for EPC/Turnkey Projects* ("Silver Book") (1999).

43 See, e.g., FIDIC, *Conditions of Contract for EPC/Turnkey Projects* ("Silver Book"), Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] (1999).

of time, the losing party might refuse to comply with the DAB decision and force the parties to arbitration to finally resolve the dispute. If neither party issues a notice of dissatisfaction, then the board's determination becomes final and binding and can be enforced before a court or arbitration as a breach of contract claim if a party fails to comply with the dispute board's determination.<sup>44</sup>

### Number of Dispute Board Members

As a default, most institutional dispute board rules call for three-member dispute boards in the event the parties do not specify a particular number.<sup>45</sup> However, the decision to utilize a specific number of dispute board members is typically contingent on the value of the project and the question of whether the cost of the board justifies the expense.

Although fee structures will vary, dispute boards typically incur costs related to individual fees, travel and lodging during site visits, and other administrative fees charged by administrative centers that are divided evenly between the parties.<sup>46</sup> As a general rule of thumb, single-member dispute boards are typically less costly than three-member dispute boards. Thus, for small projects, single-member dispute boards are often more appropriate, whereas complex/high-value projects can necessitate a larger panel.<sup>47</sup>

For example, the World Bank's procurement guidelines require three-member dispute boards for all projects valued in excess of \$50 million, one-member dispute board for all projects valued at less than \$20 million, and give the parties the option of utilizing a one- or three-member dispute board for projects valued between \$20 million and \$50 million.<sup>48</sup>

Another factor, however, is the relative complexity of the project and the individual skills of the dispute board members. A three-member panel offers the parties the ability to select experts in different disciplines, each able to grapple with some of the more technical details associated with

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<sup>44</sup> See, e.g., FIDIC, *Conditions of Contract for EPC/Turnkey Projects* ("Silver Book"), Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] (1999).

<sup>45</sup> See, e.g., FIDIC, *Conditions of Contract for EPC/Turnkey Projects* ("Silver Book"), Annex DAAB Procedural Rules, Sub-Clause 21.1 [*Constitution of the DAAB*] (2017); International Chamber of Commerce, *Dispute Board Rules, In Force from 1 October 2015, with Appendices in force as from October 2018*, 20 (2018).

<sup>46</sup> See, e.g., Armes, *Dispute Boards: Counting the Costs*, 19 DRBF FORUM 1, 10–13 (2015); International Chamber of Commerce, *Dispute Board Rules, In Force from 1 October 2015, with Appendices in force as from October 2018*, 38–43 (2018); Chern, *Chern on Dispute Boards*, at pp. 18–19 (2008).

<sup>47</sup> See Chern, *Chern on Dispute Boards*, at pp. 10–11 (2008).

<sup>48</sup> World Bank, *Standard Bidding Documents Procurement of Works*, Washington DC: World Bank, 154 (July 2019).

individual projects or disputes. Separately, a three-member dispute board may afford the board greater credibility because the members may be able to moderate each of their own individual biases and will limit the perception that any one individual could be biased against a specific party.

While a three-member dispute board is typically sufficient for most large-scale projects, in certain exceptional circumstances, where the volume of disputes may prove too much for the bandwidth of the panel or where the number of the applicable disciplines requires a number of different experts, larger panels can be utilized.<sup>49</sup> For example, on the Hong Kong International Airport Project, valued at approximately \$15 billion, the parties utilized a dispute review group of six members and a three-member panel was selected from the dispute review group for varying disputes depending on the members particular expertise.<sup>50</sup>

### Method of Appointment

The method of appointment of a dispute board will vary depending on the number of dispute board members and the applicable procedures.

In cases of one-person dispute boards, the parties are typically asked to reach agreement on the dispute board member.<sup>51</sup> In cases of three-member dispute boards, the typical process is for each party (the contractor and owner) to select one member and for the parties to jointly agree on the third member to serve as a chair.<sup>52</sup> In either case, in the event the parties fail to agree on the appointment of dispute board members, the appointing entity or administrative center will select the missing member.<sup>53</sup>

The outlier in this process is the AAA's dispute board rules which, consistent with the AAA default arbitrator selection process, utilize a rank and strike method.<sup>54</sup> This means that at the time the parties notify the AAA of their decision to appoint a dispute board in accordance with the AAA's rules, the AAA will provide the parties with a list of potential dispute board members (each with specific qualities/expertise that the parties

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49 See Chern, *Chern on Dispute Boards*, at pp. 66–67 (2008).

50 See Chern, *Chern on Dispute Boards*, at pp. 66–67 (2008).

51 See, e.g., FIDIC, *Conditions of Contract for EPC/Turnkey Projects* ("Silver Book"), Sub-Clause 20.1 [*Constitution of the DAAB*], Sub-Clause 20.2 [*Failure to Appoint DAAB Member(s)*] (1999).

52 FIDIC, *Conditions of Contract for EPC/Turnkey Projects* ("Silver Book"), Sub-Clause 20.1 [*Constitution of the DAAB*] (1999).

53 FIDIC, *Conditions of Contract for EPC/Turnkey Projects* ("Silver Book"), Sub-Clause 20.2 [*Failure to Appoint DAAB Member(s)*] (1999).

54 See American Arbitration Association, *AAA Dispute Resolution Board Guide Specifications*, at pp. 4–5 (2000).

indicated would be preferable). From that list, the parties will strike unacceptable individuals and rank the remaining members. Thereafter, the AAA will tally the ranked individuals and identify the top three collectively ranked individuals to serve as dispute board members.

Importantly, parties should be aware that many administrative centers, including the AAA, maintain lists of potential dispute board members.<sup>55</sup> Although these individuals are subject to varying degrees of vetting and qualification, they represent a pool of individuals that parties can turn to if they are unable to independently identify qualified candidates.

### Composition of Dispute Board

The qualifications of the individual dispute board members is among the most significant decisions parties face with appointing a dispute board, and the characteristics of individual dispute board members can have a significant impact on the overall effectiveness of the board. Dispute boards are often a mix of engineers and lawyers with experience in the construction industry. A common approach is for two dispute board members to be engineers and a third to be an attorney.<sup>56</sup> Further, parties must not only consider the technical qualifications of each board member, general qualities such as independence, availability, case management skills, and cultural backgrounds are critical and must not be overlooked.<sup>57</sup>

### Duration

Dispute boards can either take the form of “standing” or “*ad hoc*” boards. A standing board is a dispute board that is appointed at the outset of a project whereas an *ad hoc* dispute board is a board that is appointed only when the parties refer a formal dispute to the board for resolution.

The current trend of dispute board rules heavily favors standing dispute boards and no current set of dispute board rules call for *ad hoc* boards as a default. For example, “FIDIC strongly recommends that the DAAB be appointed, as a ‘standing DAAB’ — that is a DAAB that is appointed at the start of the Contract who visits the Site on a regular basis and remains in place for the duration of the Contract to assist the parties:

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<sup>55</sup> See American Arbitration Association, *AAA Dispute Resolution Board Guide Specifications*, at pp. 4–5 (2000); FIDIC, *President’s List of Approved Dispute Adjudicators* (2019), <http://fidic.org/president-list>.

<sup>56</sup> See Chern, *Chern on Dispute Boards*, at pp. 111–112 (2008).

<sup>57</sup> Hinchey, Prats, Wilburn, “Chapter 10: Construction Dispute Resolution”, *International Construction Law: A Guide for Cross Border Transactions and Legal Disputes*, at pp. 254–255 (2009).

a) in the avoidance of Disputes and b) in the ‘real-time’ resolution of Dispute if and when they arise, to achieve a successful project”.<sup>58</sup>

While more costly than *ad hoc* dispute boards, standing dispute boards are able to conduct periodic site visits to meet with the parties and ensure the dispute board members familiarize themselves with the project. This feature is thought to be the principal advantage of a standing board; regular site visits will permit dispute boards to build credibility with the parties and will increase the chances that a decision or recommendation would be accepted by the parties.

Further, standing dispute boards are, practically speaking, the only form of a dispute board that can accomplish early dispute avoidance. Indeed, given the 2017 FIDIC updates’ focus on early dispute avoidance, it should not be surprising that all FIDIC DAABs are standing dispute boards.<sup>59</sup> Previously, under the 1999 edition of the FIDIC contracts, only the FIDIC Red Book called for a standing dispute adjudication board.<sup>60</sup>

### Site Visits

Among the primary reasons for utilizing a standing dispute board is to enable the board to engage in regular site visits that enable its members to familiarize themselves with the parties and the subject matter of the project.

The principal question concerning site visits is when and how frequently they should take place. Practically every institutional dispute board procedure sets out a general guideline for scheduling site visits — typically three to four times a year.<sup>61</sup> In other instances, some rules require dispute boards to be present at critical construction events or at the parties’

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<sup>58</sup> See, e.g., FIDIC, *Conditions of Contract for EPC/Turnkey Projects, Guidance for the Preparation of Particular Conditions and Annexes*, 51 (2017).

<sup>59</sup> FIDIC, *Conditions of Contract for Construction For Building and Engineering Works Designed by the Employer* (“Red Book”), Sub-Clause 20.1 [*Constitution of DAAB*] (2017); FIDIC, *Conditions of Contract For Electrical and Mechanical Plant, and For Building and Engineering Works, Designed by the Contractor* (“Yellow Book”), Sub-Clause 20.1 [*Constitution of DAAB*] (2017); FIDIC, *Conditions of Contract for EPC/Turnkey Projects* (“Silver Book”), Sub-Clause 20.1 [*Constitution of DAAB*] (2017).

<sup>60</sup> See, generally, FIDIC, *Conditions of Contract for Construction For Building and Engineering Works Designed by the Employer* (“Red Book”) (1999); FIDIC, *Conditions of Contract For Electrical and Mechanical Plant, and For Building and Engineering Works, Designed by the Contractor* (“Yellow Book”) (1999); FIDIC, *Conditions of Contract for EPC/Turnkey Projects* (“Silver Book”) (1999).

<sup>61</sup> See, e.g., FIDIC, *Conditions of Contract for EPC/Turnkey Projects* (“Silver Book”), Annex DAAB Procedural Rules, Rule 3 Meetings and Site Visits (2017).

joint request.<sup>62</sup> This feature may be helpful for projects where questions concerning the achievement of substantial or final completion are likely to give rise to significant disputes. For example, according to Rules 3.3 and 3.5 of the 2017 FIDIC DAAB Procedural Rules:

“3.3 The DAAB shall hold face-to-face meetings with the Parties, and/or visit the Site, at regular intervals and/or at the written request of either party. The frequency of such meeting and/or Site visits shall be:

- (a) sufficient to achieve the purpose under Rule 3.1 above [i.e., to keep the DAAB informed];
- (b) at intervals of not more than 140 days unless otherwise agreed jointly by the Parties and the DAAB; and
- (c) at intervals of not less than 70 days, subject to Rules 3.5 and 3.6 below and except as required to conduct a hearing as described under Rule 7 below, unless otherwise agreed jointly by the Parties and the DAAB.

...

3.5 At times of critical construction events (which may include suspension of the Works or termination of the Contract), the DAAB shall visit the Site at the written request of either party. This request shall describe the critical construction event. If the DAAB becomes aware of an upcoming construction event, it may invite the Parties to make such a request.”<sup>63</sup>

While site visits will vary in substance, and are often carefully coordinated events (with formal agendas, meeting minutes, and subsequent reports), they typically involve (i) a brief progress update on the status of the project and (ii) a site inspection — especially of areas of particular concern.<sup>64</sup> Further, site visits often involve a group session that would allow the parties to share information (documents, reports, etc.) with the

<sup>62</sup> See, e.g., FIDIC, *Conditions of Contract for EPC/Turnkey Projects* (“Silver Book”), DAAB Procedural Rules Annex, Rule 3.1 (2017).

<sup>63</sup> FIDIC, *Conditions of Contract for EPC/Turnkey Projects* (“Silver Book”), DAAB Procedural Rules Annex, Rules 3.1, 3.5 (2017).

<sup>64</sup> See Chern, *Chern on Dispute Boards*, at pp. 161–184 (2008). *Conditions of Contract for EPC/Turnkey Projects* (“Silver Book”), DAAB Procedural Rules Annex, Rule 3.5 (2017); International Chamber of Commerce, *Dispute Board Rules, In Force from 1 October 2015, with Appendices in force as from October 2018*, 26 (2018).

dispute board to enable members to understand the consequences of particular events and seek out additional information as needed.<sup>65</sup>

### Hearings

In cases where a dispute is formally referred to a dispute board for a decision or recommendation, dispute boards will commonly convene hearings.<sup>66</sup> Although institutional rules provide varying degrees of procedures/guidelines for dispute board hearings, they are all clearly designed to be highly informal proceedings. In practice, hearings typically involve some form of written submissions setting out each parties' arguments (usually presented in advance of the hearing), and an opportunity for the relevant stake holders to explain their positions and answer questions.

In some instances, hearings are designed to take place during the course of previously scheduled site visits.<sup>67</sup> In other instances, hearings can be scheduled within a few weeks of receiving the referral.<sup>68</sup> Regardless, the parties can almost always work with the dispute board to determine the procedures and schedule dates.

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## Common Issues Concerning the Use of Dispute Boards

For better or worse, dispute boards raise a host of unique issues for parties operating on infrastructure projects. Below is a summary of the most common types of issues parties are likely to confront when utilizing a dispute board.

### Gamesmanship

Among the most common issues raised by dispute boards is the question of whether to utilize them in the first place. Indeed, parties must determine whether the potential benefits of a dispute board outweigh the costs. For all of the reasons discussed above, dispute boards, if utilized as designed, can produce a cost-effective means of resolving disputes without the need

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<sup>65</sup> See, generally, Chern, *Chern on Dispute Boards*, at pp. 161–184 (2008). *Conditions of Contract for EPC/Turnkey Projects* (“Silver Book”), DAAB Procedural Rules Annex, Rule 3.5 (2017); International Chamber of Commerce, *Dispute Board Rules, In Force from 1 October 2015, with Appendices in force as from October 2018*, 26 (2018).

<sup>66</sup> See, e.g., FIDIC, *Conditions of Contract for EPC/Turnkey Projects* (“Silver Book”), DAAB Procedural Rules Annex, Rule 7 (2017).

<sup>67</sup> American Arbitration Association, *AAA Dispute Resolution Board Guide Specifications*, 8 (2000).

<sup>68</sup> See, e.g., International Chamber of Commerce, *Dispute Board Rules, In Force from 1 October 2015, with Appendices in force as from October 2018*, 33 (2018).

to incur the expense of litigation or arbitration. However, parties should also appreciate that the dispute board process can be readily undermined by a party with little to gain from the dispute board mechanism.

One common example is a case where a party simply issues a notice of dissatisfaction or ignores a recommendation in every instance.<sup>69</sup> In doing so, the party renders the entire purpose of the dispute board moot because the only means the opposing party has to vindicate its rights is to seek out arbitration or litigation. As a result, under these circumstances, the dispute board becomes little more than a costly interim step to arbitration. In many cases, this scenario occurs because the parties have become entrenched in their positions, and the aggregate value of their claims are so significant, that their only true means to resolving the dispute is through final and binding arbitration or litigation.

Separately, parties would be well advised to consider utilizing the early dispute resolution feature of a DAAB or Combined Dispute Board to help potentially resolve lower value claims early on before those small value claims begin to collect and create an intractable dispute.

### **Non-Binding Recommendations or Interim-Binding Decisions**

The question of whether dispute boards should be empowered to issue non-binding recommendations (according to the dispute review board model) or interim-binding decisions (according to the dispute adjudication board model) has been the subject of much debate.

For a large part, a party's preference toward one model over the other may be a product of cultural preferences. In the United States and under U.S.-based institutional dispute board rules, for example, dispute review boards with the authority to issue non-binding recommendations tends to be the most common approach.<sup>70</sup> By contrast, in the United Kingdom and on projects governed by U.K.-based contracts, dispute adjudication boards tend to be preferred.<sup>71</sup> There are, however, advantages and disadvantages to either model.

In the case of dispute review boards, non-binding recommendations can be advantageous because: (i) they are often less adversarial and may, therefore, more readily facilitate agreement; (ii) hearings are typically

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<sup>69</sup> See also Goodrich, *Dispute Adjudication Boards: Are they the future of dispute resolution?* (6 September 2016) available at <https://www.whitecase.com/publications/article/dispute-adjudication-boards-are-they-future-dispute-resolution>.

<sup>70</sup> See, generally, Chern, *Chern on Dispute Boards*, at pp. 4–5 (2008); Hinchey, Prats, Wilburn, “Chapter 10: Construction Dispute Resolution”, *International Construction Law: A Guide for Cross Border Transactions and Legal Disputes*, at pp. 254–263 (2009).

<sup>71</sup> See also Chern, *Chern on Dispute Boards*, at pp. 4–5 (2008); Hinchey, Prats, Wilburn, “Chapter 10: Construction Dispute Resolution”, *International Construction Law: A Guide for Cross Border Transactions and Legal Disputes*, at pp. 254–263 (2009).

shorter, simpler, and less formalized, leading to lower costs; and (iii) a less adversarial recommendation is often all that is necessary for parties to settle disputes in cases where there is no interest in pursuing the matter to arbitration or the courts.

However, non-binding recommendations risk permitting the losing party to delay the ultimate enforcement of the recommendation. In these circumstances, a dispute board could become a costly and pointless interim step before arbitration, and by delaying the ultimate enforcement of a recommendation a party may be able to leverage its position to extract concessions from the successful party.<sup>72</sup>

In the case of dispute adjudication boards, interim-binding decisions offer a similar variety of advantages and disadvantages. On one hand, interim binding decisions (i) can be more readily enforced in subsequent court or arbitration proceedings without the need to hold another hearing on the merits of the underlying dispute, and (ii) are bound to be taken more seriously by the parties given the effect of a decision and can lead to settlement.

Further, maybe most importantly, interim binding decisions (theoretically) ensure a contractor can immediately access cash in the event the owner loses at the dispute board level. By contrast, however, interim binding decisions may (i) give rise to higher costs because of the amount of time and effort required to argue a case before the dispute board; (ii) offer illusory benefits given that a party can readily challenge and ignore a binding decision by virtue of a notice of dissatisfaction; and (iii) further entrench the parties' positions given the adversarial nature of the process.<sup>73</sup>

Given the above, it is very difficult to discern whether a non-binding recommendation or interim-binding decision is more effective. Often, the answer will depend on the nature of the project, parties, and members of the dispute board.

### Conditions Precedent

Depending on the terms of a construction contract, dispute board decisions or recommendations are often conditions precedent to the initiation of an arbitration or litigation.<sup>74</sup> It is commonly the case that by the time

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<sup>72</sup> See also Chern, *Chern on Dispute Boards*, at pp. 4–5 (2008); Hinchey, Prats, Wilburn, “Chapter 10: Construction Dispute Resolution”, *International Construction Law: A Guide for Cross Border Transactions and Legal Disputes*, at pp. 254–263 (2009).

<sup>73</sup> See also Chern, *Chern on Dispute Boards*, at pp. 4–5 (2008); Hinchey, Prats, Wilburn, “Chapter 10: Construction Dispute Resolution”, *International Construction Law: A Guide for Cross Border Transactions and Legal Disputes*, at pp. 254–263 (2009).

<sup>74</sup> See, e.g., FIDIC, *Conditions of Contract for EPC/Turnkey Projects* (“Silver Book”), Sub-Clause 21.6 [Arbitration] (2017).

a dispute arises, one party hopes to proceed immediately to arbitration/the courts while the other wishes to follow through with the dispute board process. Although the courts of the United States and United Kingdom will typically enforce conditions precedent to arbitration, absent a mutual agreement to bypass the condition, parties should be familiar with the laws of the applicable jurisdiction.

### **Enforcement of DAB Proceedings**

Unlike arbitration awards, dispute board decisions/recommendations cannot be readily enforced in the local courts or in a subsequent arbitration proceedings — there is no equivalent to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e., the New York Convention) for dispute board decisions.<sup>75</sup>

As a result, in cases of a final and binding dispute board decision, where no notice of dissatisfaction was issued, parties must more commonly present their case as a breach of contract claim (i.e., the failure of a party to abide by a binding decision to which it did not submit a notice of dissatisfaction amounts to a breach of the dispute resolution clause of the contract).<sup>76</sup> In cases of non-binding recommendations, unless agreed otherwise, the party may typically only use the recommendation as persuasive evidence in support of its case.

A problematic scenario arises when a party refuses to comply with a binding, but not yet final, decision. Can the injured party proceed straight to the court or arbitration to vindicate its rights or must it wait for the notice of dissatisfaction period to pass? This scenario was raised before the Singapore High Court in the case of *PT Perusahaan Gas Negara TBK (Persero) vs. CRW Joint Operation (Indonesia)*, also referred to as the *Persero* case.<sup>77</sup>

Although the procedural history underlying the *Persero* case is complex, the matter stems from a dispute adjudication board's binding

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<sup>75</sup> See also Hinchey, Prats, Wilburn, "Chapter 10: Construction Dispute Resolution", *International Construction Law: A Guide for Cross Border Transactions and Legal Disputes*, 263 (2009).

<sup>76</sup> FIDIC, *Conditions of Contract for EPC/Turnkey Projects* ("Silver Book"), Sub-Clause 21.6 [*Arbitration*] (2017).

<sup>77</sup> See *Perusahaan Gas Negara TBK (Persero) vs. CRW Joint Operation (Indonesia)* [2010] 4 SLR 672; [2011] 4 SLR 305; [2014] SGHC 146; [2015] SGCA 30; See also Tan and Coldwell, "Another (Unsuccessful) Challenge to the Finality of Interim Arbitration Awards in Singapore and Enforcing DAB Decisions on International Projects under FIDIC", Kluwer Arbitration Blog (15 June 2015) <http://arbitrationblog.kluwerarbitration.com/2015/06/15/another-unsuccessful-challenge-to-the-finality-of-interim-arbitral-awards-in-singapore-and-enforcing-dab-decisions-on-international-projects-under-fidic/>.

decision that ordered an employer to pay \$17 million to a contractor in connection with a natural gas pipeline project in Indonesia governed by the 1999 FIDIC Red Book.<sup>78</sup> Despite the binding nature of the decision, the employer refused to comply. Given the contractor's concerns of available cash flows, the contractor sought to immediately compel the employer to comply with the decision through an ICC arbitration. The employer resisted the contractor's efforts and argued that because the decision was not final, it could not be immediately enforced by the arbitral tribunal without a hearing on the merits of the DAB's decision.<sup>79</sup>

After two separate arbitration proceedings and two more actions before the Singapore courts, the Singapore High Court ultimately concluded that the employer must immediately comply with the DAB's decision and debate the merits later on. Critical to the Singapore High Court's decision was that DAB decisions were intended to facilitate cash flows for contractors and that the concept of "pay now, argue later" should prevail.<sup>80</sup>

The 2017 FIDIC update sought to address the issue raised in *Persero* under Sub-Clause 21.7 [*Failure to Comply with DAAB's Decision*] which states:

"In the event that a Party fails to comply with any decision of the DAAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the

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<sup>78</sup> See *Perusahaan Gas Negara TBK (Persero) vs. CRW Joint Operation (Indonesia)* [2010] 4 SLR 672; [2011] 4 SLR 305; [2014] SGHC 146; [2015] SGCA 30; See also Tan and Coldwell, "Another (Unsuccessful) Challenge to the Finality of Interim Arbitration Awards in Singapore and Enforcing DAB Decisions on International Projects under FIDIC", Kluwer Arbitration Blog (15 June 2015) <http://arbitrationblog.kluwerarbitration.com/2015/06/15/another-unsuccessful-challenge-to-the-finality-of-interim-arbitral-awards-in-singapore-and-enforcing-dab-decisions-on-international-projects-under-fidic/>.

<sup>79</sup> See *Perusahaan Gas Negara TBK (Persero) vs. CRW Joint Operation (Indonesia)* [2010] 4 SLR 672; [2011] 4 SLR 305; [2014] SGHC 146; [2015] SGCA 30; See also Tan and Coldwell, "Another (Unsuccessful) Challenge to the Finality of Interim Arbitration Awards in Singapore and Enforcing DAB Decisions on International Projects under FIDIC", Kluwer Arbitration Blog (15 June 2015) <http://arbitrationblog.kluwerarbitration.com/2015/06/15/another-unsuccessful-challenge-to-the-finality-of-interim-arbitral-awards-in-singapore-and-enforcing-dab-decisions-on-international-projects-under-fidic/>.

<sup>80</sup> See *Perusahaan Gas Negara TBK (Persero) vs. CRW Joint Operation (Indonesia)* [2010] 4 SLR 672; [2011] 4 SLR 305; [2014] SGHC 146; [2015] SGCA 30; See also Tan and Coldwell, "Another (Unsuccessful) Challenge to the Finality of Interim Arbitration Awards in Singapore and Enforcing DAB Decisions on International Projects under FIDIC", Kluwer Arbitration Blog (15 June 2015) <http://arbitrationblog.kluwerarbitration.com/2015/06/15/another-unsuccessful-challenge-to-the-finality-of-interim-arbitral-awards-in-singapore-and-enforcing-dab-decisions-on-international-projects-under-fidic/>.

failure itself directly to arbitration . . . . The arbitral tribunal (constituted under Sub-Clause 21.6 [*Arbitration*]) shall have the power, by way of summary or other expedited procedure, to order, whether by an interim or provisional measure or an award . . . the enforcement of that decision.”<sup>81</sup>

However, given the wide variety of standard form agreements and dispute board procedures, the risk that a *Persero*-scenario could still arise under a different standard form agreement or dispute board procedure remains a live issue.

### **Role of External Counsel**

Given the relatively informal nature of dispute board proceedings, and that dispute board members principally interact with members of the project teams, the role of formal counsel in dispute board proceedings is debated. Some dispute boards frown on the direct involvement of counsel out of fear that the involvement of attorneys can unnecessarily escalate the dispute and cause the parties to take more entrenched positions — inevitably making compromise more difficult to obtain.

However, given the procedures involved and the inevitably adversarial nature of some dispute board proceedings, some parties find the direct participation of counsel helpful for purposes of navigating the process. In practice, the happy medium in many cases seems to be that counsel is often asked to advise the party without directly engaging with the dispute board or during the proceedings.

### **Cultural Approaches**

As a final matter, parties should be aware of the varying cultural sensitivities of the international parties when utilizing dispute boards. Indeed, dispute boards are, broadly speaking, the product of common law legal traditions utilized most commonly in the English speaking world.<sup>82</sup> While civil law jurisdictions have grown familiar with dispute boards, they have not reached the level of acceptance seen in the United States, United Kingdom, Australia, or South Africa.<sup>83</sup> In other areas, such as the

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<sup>81</sup> See, e.g., FIDIC, *Conditions of Contract for EPC/Turnkey Projects* (“Silver Book”), Sub-Clause 21.7 [*Failure to Comply with DAAB’s Decision*] (2017).

<sup>82</sup> See, generally, Dispute Resolution Board Foundation, DB Project Database (2019) <http://www.drb.org/publications-data/drb-database/>.

<sup>83</sup> See, generally, Dispute Resolution Board Foundation, DB Project Database (2019) <http://www.drb.org/publications-data/drb-database/>.

Middle East, dispute boards are almost universally rejected and stricken from form contracts.<sup>84</sup> In short, while dispute boards may hold promise, cultural and legal traditions play a strong role in how and when dispute boards are utilized.

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## Use of Dispute Boards Outside the Construction Industry

### In General

Dispute boards are successful in the construction industry because of the unique features of construction disputes. Simply put, given the lengthy duration of construction projects, complexities of the underlying engineering disputes, number of claims/disputes and, at least in some circumstances, cultural differences between parties on international projects, construction projects commonly generate disputes that retain features which are not common to most business relationships.

Nevertheless, the effectiveness of dispute boards within the construction history have led many to raise the question of whether dispute boards can be adapted to disputes elsewhere. The following section discusses this topic in the context of both standing and *ad hoc* dispute boards.

### Standing Dispute Boards in Other Industries

While not widespread, a number of industries or business arrangements have experimented with the standing dispute board model. These areas include the maritime construction, financial services, joint ventures, and corporate governance agreements.<sup>85</sup> In these cases, parties typically enter into long-term financial relationships where disputes are likely to arise and could risk jeopardizing the underlying venture.

The case of closed corporation or even a joint venture, where deadlocks between owners are possible, is a good example of where the standing dispute board model could function well. Whether through informal conciliation, formalized recommendations, or even binding decisions, a

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<sup>84</sup> See, e.g., Goodrich, *Dispute Adjudication Boards: Are they the future of dispute resolution?* (6 September 2016), available at <https://www.whitecase.com/publications/article/dispute-adjudication-boards-are-they-future-dispute-resolution>.

<sup>85</sup> See Hafner, "Dispute Review Boards and Other Standing Neutrals: Achieving 'Real Time' Resolution and Prevention of Disputes", *CPR Dispute Prevention Briefing: Construction*, at pp. 16–17 (2010); Chern and Kock, *Efficient Dispute Resolution in the Maritime Construction Industry: Dispute Boards in Maritime Construction* (2005); Chern, *Chern on Dispute Boards*, at p. 256 (2008).

neutral third-party board familiar with the business might assist the parties to break a deadlock without the need to resort to the courts or arbitration.<sup>86</sup> Similar scenarios could arise in cases involving other financial transactions, such as corporate mergers and acquisitions where new governing rules/structures may not readily address all of conflicts generated by the merger/acquisition of a new business unit or company.

Another example is long-term supply contracts which contemplate purchase price adjustments after specified periods of time based on pre-agreed formulas. Parties often appoint independent accounting experts to resolve pricing adjustment disputes and there is reason to believe that the standing dispute board model might be equally as applicable in such a situation because it could ensure consistency in the event of multiple pricing disputes over time.

Concession agreements and operation and maintenance contracts may also be appropriate areas to utilize dispute boards. Given the lengthy nature of these agreements and the potential for disputes during the life of the agreement, dispute boards offer a potential means to resolve problems in real time and preserve the relationship. This might even be more applicable to internationally-based contracts where local courts or international arbitration are not viewed as an acceptable dispute resolution mechanism given a perceived lack of neutrality or significant costs.

Overall, in industries where long-term financial/business relationships are common, and complex disputes are likely, dispute boards offer a potential opportunity to avoid the need to refer all disputes to conventional litigation or arbitration proceedings.

### ***Ad Hoc* Dispute Boards in Other Industries**

Although the construction industry has moved away from the use of *ad hoc* dispute boards, in some ways, *ad hoc* dispute boards may be the most promising area for growth for dispute boards outside the construction industry. While standing dispute boards are generally only useful for long-term business relationships, *ad hoc* dispute boards might be appropriate for any number of circumstances. In particular, a formalized *ad hoc* dispute board process could be utilized as a substitute for mediation proceedings.

For one, the dispute board process would create a platform for the parties to test their positions before a neutral body of subject matter

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<sup>86</sup> See Hafner, "Dispute Review Boards and Other Standing Neutrals: Achieving 'Real Time' Resolution and Prevention of Disputes", *CPR Dispute Prevention Briefing: Construction*, at pp. 16–17 (2010).

experts. In doing so, the dispute board may provide the parties an unvarnished assessment of their cases before the parties incur the expense and effort of pursuing their claims through arbitration or litigation — and ultimately may foster settlement. Although this form of procedure is not uncommon to mediation practices, a formalized dispute board proceeding would make the recommendation/decision the focus of the parties' efforts.

Further, depending on cultural traditions and approaches to dispute resolution, a dispute board of experts may be more effective at steering the parties towards a settlement as compared to a traditional mediator. Indeed, as a matter of practice, while mediators commonly retain an area of subject matter expertise and are highly trained at utilizing techniques to foster agreement and compromise, they are typically attorneys by training. As a result, to some parties, attorney/mediators may have less credibility than a group of experts in the industry or field.

Lastly, in cases of highly technical disputes, dispute boards retain certain advantages over traditional mediation. Practically speaking, every dispute will require the mediator, adjudicator, and board to learn about the intricacies of the dispute, with there always being a risk that the neutral will struggle to understand the issues. That risk, however, may diminish by utilizing a dispute board of experts in the particular field.

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## **Conclusion**

International dispute resolution often hinges on the ability of the parties to creatively fashion mechanisms that enable them to quickly and effectively manage disputes. Given the unique characteristics of construction disputes, dispute boards are examples of this process. As different industries and jurisdictions continue to experiment with new forms of international dispute resolution, dispute boards could offer features worth exploring.

## DISPUTE BOARD RULES AND PROCEDURES MATRIX<sup>1</sup>

Rules	Source	Dispute Board Type(s)	Ad hoc / Standing	Size of Board	Monitoring	Early Dispute Avoidance	Dispute Adjudication	Time Limits on Decisions or Recommendations	Procedure	Effect of Decision / Recommendation	Waiting Period/ Condition Precedent to Arbitration	Established List of Qualified Dispute Board Members	Method of Appointment
FIDIC (First Edition 1999)	FIDIC “Red Book,” “Yellow Book,” and “Silver Book” (First Edition 1999)	Dispute Adjudication Board	Standing – FIDIC Red Book  <i>Ad Hoc</i> – FIDIC Yellow and Silver Book	One or three DB members.  Unless agreed otherwise, the DB shall have three members.	(Red Book Only) DB to maintain regularly scheduled site visits. The site visits shall be at intervals of no more than 140 days and no less than 70 day, unless otherwise agreed by the parties.  At the conclusion of each site visit and before leaving the site, the DB shall prepare a report on its activities during the visit and shall send copies to the parties.	None	If a dispute (of any kind whatsoever) arises between the parties, then either party may refer the dispute to the DB for a decision.	The DB shall give its decision within (i) 84 days after receive reference of the dispute or (ii) within such other period as may be proposed by the DB and approved by the parties.	To refer a dispute to the DB, a party must issue refer the dispute to the DB in writing with copies to the opposing party and the engineer. The reference must that that it is made in accordance with Sub-Clause 20.4 [ <i>Obtaining Dispute Adjudication Board’s Decision</i> ].  The DB is empowered to establish the schedule and procedure for purposes of deciding the dispute and may request written documents and arguments from the parties.	The decision shall be binding on both parties, who shall promptly give effect to it unless and until it is revised in an amicable settlement or an arbitral award.  If a party is dissatisfied with a decision, it may issue a notice of dissatisfaction within 28 days of receiving the decision.  If either party fails to issue a notice of dissatisfaction within 28 days of receiving the decision, then the decision shall become final and binding upon both parties.  Any decision of the DB shall be admissible in evidence in the arbitration	The parties may not proceed to arbitration unless (i) a party has issued a notice of dissatisfaction within 28 days of the DB’s decision and (ii) the parties have attempted to settle the dispute amicably or at least 56-days have passed since the notice of dissatisfaction was issued and no attempt at amicable settlement was made.	Yes	<i>Single Member DB</i> – Parties shall jointly appoint a DB.  <i>Three Member DB</i> – Each party shall nominate one member for the approval of the other party. The parties shall consult both members and shall agree upon a third member, who shall be appointed to act as chairman.  If, under either scenario, the parties cannot agree on the appointment of a DB member, the “appointing entity” or “official named” in the Appendix to Tender shall, upon the request of either or both parties, and after due consultation with both parties, appoint the DB member. If no appointing entity or official is named in the Appendix the President of FIDIC, or a person appointed by the President of FIDIC will be the appointing entity.

<sup>1</sup> For the sake of brevity and where appropriate, the authors have paraphrased the various dispute board rules. Parties should carefully consult the text of the relevant dispute board rules to ensure they understand the applicable procedures.

Rules	Source	Dispute Board Type(s)	Ad hoc / Standing	Size of Board	Monitoring	Early Dispute Avoidance	Dispute Adjudication	Time Limits on Decisions or Recommendations	Procedure	Effect of Decision / Recommendation	Waiting Period/ Condition Precedent to Arbitration	Established List of Qualified Dispute Board Members	Method of Appointment
FIDIC (Second Edition 2017) <sup>2</sup>	FIDIC “Red Book,” “Yellow Book,” and “Silver Book” (Second Edition 2017)	Dispute Avoidance / Adjudication Board	Standing	One or three DB members.  Unless agreed otherwise, the DB shall have three members.	DB to maintain regularly scheduled site visits. The site visits shall be at intervals of no more than 140 days and no less than 70 day, unless otherwise agreed by the parties.  DB shall also visit the site during critical construction events.  DB to provide written report within 7 days of the Site visit.	The parties may jointly request (in writing), that the DB provide assistance and/or informally discuss and attempt to resolve any issue or disagreement between them. If the DB becomes aware of an issue or disagreement, it may invite the parties to make such a joint request.  Joint requests for informal assistance may be made at any time, except for during the period where the Employer’s Representative is carrying out his or her duties under Sub-Clause 3.5 [Agreement or Determination].  Such informal assistance may take place during any meeting, site visit, or otherwise. Informal assistance or advice is not binding in any	If a dispute arises between the parties, then either party may refer the dispute to the DB for a decision (without the need to seek informal assistance) <i>provided that</i> :  If Sub-Clause 3.5 [Agreement or Determination] applied to the dispute, the reference of dispute to the DB must be made within 42 days of the date a party issues a notice of dissatisfaction to the Employer’s Representative’s determination.	The DB shall complete and give its decision within either (i) 84 days after receiving the reference of dispute or (ii) such period as proposed by the DB and agreed by the parties.	To refer a dispute to the DB, the party must issue a “reference of dispute” to the DB that (i) states that the reference is made under Sub-Clause 21.4.1 [Reference of Dispute to the DAAB]; (ii) sets out the dispute; and (iii) be in writing.  Thereafter, the parties shall make all information available to the DB and permit the DB to access the site or facilities, as a reasonably necessary.  The DB must ensure that each party has a reasonable opportunity to put forward its case or response.  The procedure and schedule (including timeline for submissions and hearing dates) is not fixed and will take into account the dispute and the need to avoid unnecessary delay and costs.	The decision shall be binding on both parties, who shall promptly comply with it whether or not a party gives a notice of dissatisfaction with respect to such decision.  If a party is dissatisfied with the decision, it may issue a notice of dissatisfaction within 28 days after receiving the DB’s decision.  If either party fails to issue a notice of dissatisfaction within 28 days of receiving the DB’s decision, then the decision shall become final and binding upon both parties.  Any decision of the DAB shall be admissible in evidence in the arbitration.  In the event a party fails to comply with any decision of the DB, whether binding or final and binding, then the other party may, without prejudice to any other rights it may have, refer the failure itself directly to arbitration. The arbitral tribunal shall have the power, by way of summary or expedited procedure, to order, whether by an interim or provisional measure or an award, the	If a notice of dissatisfaction has been given pursuant to Sub-Clause 21.4.4 [Obtaining DAAB’s Decision], both parties shall attempt to settle the Dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the 28 <sup>th</sup> day after the day on which the notice of dissatisfaction was issued, even if no attempt at amicable settlement has been made.	Yes	The FIDIC Particular Conditions to each FIDIC contract will contain two lists of potential DB members. As a default, One list will include three potential DB members selected by the employer and the other list will include three potential DB members for the contractor.  <i>Single Member DB –</i> As a default, the parties will jointly agree to appoint a sole DB member from the six potential DB members listed in the Contract Data. If the parties cannot agree on the sole DB member within 28 days of the execution of the Contract Agreement, then the appointing entity or official named in the Contract Data will appoint the DB member, at the request of either or both parties and after consultation of both parties. As a default, the President of FIDIC or a person appointed by the President of FIDIC will be the appointing entity.  <i>Three Member DB –</i> Each party shall

<sup>2</sup> [Covers Red Book, Yellow Book, and Silver Book].

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						way, whether provided orally or in writing.				enforcement of the decision.			select one DB member from the list of potential DB members in the Contract Data. Thereafter, the parties shall consult with the two selected DB members and shall agree to a third member (also listed in the Contract Data), who shall be the chair. If the parties cannot select or agree to a DB member, the appointing entity or official named in the Contract Data will appoint the remaining DB members as outlined above.
International Chamber of Commerce	International Center for ADR, Dispute Board Rules (October 2015)	Dispute Review Board; Dispute Adjudication Board; Combined Dispute Board	Standing	Typically one or three DB members, but the parties may agree to a larger DB.  Unless agreed otherwise, the DB shall have three members.	DB to maintain regularly scheduled site visits, with a minimum of three per year if site visits are relevant to the contract.  DB to provide written report following each site visit.	On its own initiative or at the request of any party, the DB may informally assist the parties in resolving disagreements that have arisen during the performance of the contract.	At any time, a party may refer a disagreement to the DB for a Conclusion.	Unless agreed otherwise, DB must issue its decision within 90 days of the Date of Commencement. However, the DB may extend the time limit with the agreement of the parties. In the absence of such agreement, the DB may, after consulting with the parties, extend the time limit by the shortest time it considers necessary, provided, however, that the total duration of any such extension shall not exceed 20 days. In deciding whether to extend the time limit, the DB and the parties shall take into account the nature and complexity of the Dispute and other relevant circumstances.  The ICC also permits the parties to agree to allow	To refer a disagreement to the DB, the party must submit a "Statement of Case." The date of receipt by the DB of the Statement of Case is the Date of Commencement.  Unless the parties agree otherwise or the DB orders otherwise, the opposing party will have 30 days to prepare a Response to the Statement of Case.  Unless the parties agree otherwise or the DB orders	In cases of dispute adjudication boards and combined dispute boards (where the parties request a "Decision"):  A DB decision is binding upon its receipt notwithstanding any expression of dissatisfaction.. Unless a party contests the decision within 30 days it shall become final—the parties cannot contest a final decision unless such agreement is prohibited by law.  If any party fails to comply with a decision, whether binding or both final and binding, the other party may refer the failure itself immediately to	No waiting period or other condition precedent required following notice of dissatisfaction.	No	<i>Single Member DB</i> – The parties will appoint the DB member by joint agreement. If no agreement is reached within 30 days of contract execution or within 30 days after the commencement of any performance under the Contract, the International Centre for ADR (an administrative body of the ICC), will appoint the DB member.  <i>Three Member DB</i> – The parties shall jointly appoint the first two DB members. If the parties fail to appoint one or both DB members, both shall

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								DB decisions to be reviewed by the ICC International Centre for ADR as to the form of the decision (a service that will be provided at an additional expense to the parties). If the parties provide for review of the decision by the Centre, the time limit for rendering a decision shall be extended by 30 days to permit the Centre to complete its review.	otherwise, a hearing will be held within 15 days of the date the DB receives the Response.	arbitration or, where applicable, a court of competent jurisdiction.  Unless otherwise agreed by the parties, any decision, shall be admissible in any judicial or arbitral proceedings in which all of the parties were parties to the DB proceedings.  In cases of dispute review boards or combined dispute boards (where the parties request a "recommendation"), the parties may comply with a DB recommendation voluntarily, but are not required to do so. If no party has given a written notice to the other party and the DB expressing its dissatisfaction with a recommendation within 30 days of receiving it, the recommendation shall become final and binding on the parties. The parties shall comply without delay with a recommendation that has become final and binding and agree not to contest that recommendation, unless such agreement is prohibited by law.			be appointed by the Centre.  The third DB Member shall be proposed to the Parties by the first two DB Members within 30 days following the appointment of the second DB Member. If the parties do not appoint the proposed third DB member within 15 days, the third member shall be appointed by the Centre at the request of any party. The third DB Member shall act as president of the DB unless all DB Members agree upon another president with the consent of the Parties.
American Arbitration Association	AAA Dispute Resolution Board Guide Specifications	Dispute Resolution Board	Standing	One or three members.  Unless agreed otherwise, the	The DB will visit the project site and meet party representatives at regular intervals.	Each site visit meeting shall consist of an informal roundtable	A dispute may be referred to the DB if (i) either party believes bilateral	Unless agreed otherwise, the DB will issue its recommendation for the resolution of the dispute in writing to both parties,	To refer a dispute to the DB, the "Request for Board Review" must be set forth	Recommendation is non-binding. However, within 14 days of the date of the recommendation,	Parties are free to refer the dispute to arbitration or litigation following a DB	Yes	<i>Single Member DB</i> – Within 14 days of receipt of a Request for Dispute Resolution Board

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				DB shall have three members.	<p>The frequency and scheduling of these visits will be every three months or as agreed upon by the parties and DB.</p> <p>DB to provide site meeting of minutes within two weeks of the site visit.</p>	discussion and field observation of the work. The Roundtable discussion will be attended by authorized representatives of the Owner and Contractor. During the discussion, the Board may facilitate conversation among and between the parties in order to resolve any pending claims which may become disputes.	negotiations are unlikely to succeed and (ii) any mandatory pre-DB decisions have been issued.	within 14 days of the completion of the hearings.	<p>in writing and describe the nature of the dispute, the factual and contractual basis of the dispute, and all remedies sought, along with all supporting documentation.</p> <p>Within 28 days after the Request for Board Review is filed, the opposing party shall submit its response and counterclaims (if applicable). If a counterclaim is submitted, the opposing party will have another 28 days to respond.</p> <p>DB will schedule the date of the hearing within 7 days of receipt of the response (or response to counterclaim). The hearing will be scheduled during a regularly scheduled site visit.</p>	<p>parties are required to provide written notice to the other of their acceptance or rejection of the recommendation. If a party fails to respond to the recommendation, it will be deemed to have accepted the recommendation.</p> <p>The DB's recommendation may be admissible, to the extent permitted by law, as evidence in any subsequent dispute resolution forum.</p>	<p>recommendation subject to any specific conditions precedent in the parties' contract.</p> <p>The parties may also refer the dispute to mediation or any other form of alternative dispute resolution at any time.</p>	<p>Assistance, the AAA will issue the parties an identical list of persons selected from the AAA's International Roster of DRB members. The parties will have 14 days to rank and strike the proposed DB members on the AAA's proposed list. The parties may strike up to three names each. The AAA will then select the board member based on the parties rank and strike preferences.</p> <p><i>Three Member DB -</i> Within 14 days of the effective date of the Contract, the parties shall file a Request for Dispute Resolution Board Assistance with the American Arbitration Association. Within 14 days of the Request for Dispute Resolution Board Assistance, the AAA shall provide the parties with an identical list of persons selected from the AAA's roster of DRB members.</p> <p>Within 14 days of receiving the AAA's roster of DRB members, each party will nominate a proposed DB member from the list. The opposing</p>	

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													<p>party will have 14 days thereafter to accept or reject the nomination. In the event of a rejection, the nominating party will propose another nominee within 14 days.</p> <p>Upon the acceptance of the first two members of the DB, the AAA will forward the two selected DB members a list of potential DB members and the two selected DB members will endeavor to select the third DB member within 14 days. Upon nominating the third DB member, each party will have 14 to accept or reject the nomination.</p>
Dispute Resolution Board Foundation	Dispute Review Board Guide Specification, Section 2, Appendix 2A (January 2007).	Dispute Review Board	Standing	Three	<p>The DB shall visit the project site and meet with representatives of the parties at periodic intervals and at other times requested by the parties.</p> <p>Each meeting shall consist of a field observation and an informal discussion of the work with both</p>	<p>Prior to a the referral of a dispute to the DB, the parties must engage in good-faith negotiations to settle the dispute. Good-faith negotiations may involve the solicitation and rendering of a DB advisory opinion. Advisory</p>	<p>A dispute may be referred to the DB any time after the parties engage in good-faith negotiations.</p> <p>If the contract stipulates a precedent dispute resolution process prior to referral to the DRB, and if one party fails to meet or adhere to</p>	The DB shall submit its recommendations for the resolution of a dispute as soon as possible after the completion of the hearing as agreed by the parties.	To refer a dispute to the DB, either party must do so in writing to the DB chair with copies to the other board members and the opposing party. The referral shall define the nature and specifics of the dispute that are to be considered by the DB.	The DB's report is non-binding. However, within 14 days of the date of the report, either party may accept or reject the report. The failure to accept or reject the period within the 14 day period will be deemed as an acceptance.	The dispute resolution process is a condition precedent to initiating a subsequent dispute resolution process such as arbitration or litigation.	No <sup>3</sup>	<p>After the award of the contract, the parties shall meet to jointly select prospective nominees. The parties shall have three weeks to solicit and receive information from prospective candidates, and another two weeks to review and jointly agree on the final selection of the three members to serve on</p>

<sup>3</sup> The Dispute Resolution Board Foundation website provides a directory of organizational members, many of which are ostensibly qualified candidates for potential dispute board appointments. However, the Dispute Resolution Board Foundation's member directory contains hundreds of members, and does not maintain a limited list of highly qualified candidates like other organizations.

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					owner and contractor.	opinions are only available if mutually requested by the parties.	the time requirements set forth under the contract for this process, the other party may then refer the dispute to the DRB. In the event that the contract does not specify such precedent process, or specifies a precedent process without time requirements, either party may refer the dispute to the DRB after passage of a reasonable period of time without progress toward a negotiated settlement and the DRB will determine if the dispute should be heard.		The DB will confer with the parties to establish a date for delivering pre-hearing submissions, a date and time for a DB hearing. Hearings shall be convened at the next period meeting, unless the parties agree to a shorter or longer period of time.	Either party may request reconsideration of a report, within 10 days following receipt of the report, when new information is obtained or developed that was not known at the time of the hearing, or when, in the party's opinion, the DRB misunderstood or failed to consider pertinent facts of the dispute. Within a reasonable period of time, the DRB shall provide written reconsideration to both parties.			the DB. In the event that all three members were not selected from the initial pool of nominees, the process shall be repeated. If the chair has not already been selected, then as soon as practicable, the DB members will nominate a chair and submit the nominee's resume and request approval from the parties.
Chartered Institute of Arbitrators	Dispute Board Rules, Chartered Institute of Arbitrators (August 2014).	Dispute Review Board; Dispute Adjudication Board	Standing	One or three DB members.  Unless agreed otherwise, the DB shall have three members.	When site visits are relevant to the contract, the DB will visit the project site every 4 months or as agreed between the parties and the DB depending on the progress of the work.  At the conclusion of each site visit or meeting, the DB will prepare a report on the site visit or meeting	The parties may at any time jointly refer a matter or dispute to the DB for it to give an informal advisory opinion as means of dispute avoidance and/or informally discuss and attempt to resolve any disagreement that may have arisen between	Provided that the parties have complied with any contractual conditions precedent, either party may at any time given notice of its intention to refer a dispute to the DB.	The DB must submit its recommendation/decision within 84 days of the date the DB received the referring party's position statement.	To refer a dispute to the DB, the referring party must submit a position statement to the DB and opposing party. The position statement must include a summary of the dispute, a list of the issues submitted to the DB for a recommendation or decision, and the referring	Recommendations issued by Dispute Review Boards are non-binding. If a Dispute Review Board issues a recommendation, each party shall submit a written acceptance or rejection of the recommendation within 21 days of receipt of the recommendation. Recommendations are admissible in any subsequent arbitration or judicial proceeding.  Decisions issued by	<i>DRB</i> - After 21 days from receipt of a recommendation, either party may submit the dispute to arbitration or, if the parties have agreed, the courts.  <i>DAB</i> - If one party rejects the decision or fails to comply with it, either party may submit the dispute to arbitration for summary or other expedited relief	No	<i>Single Member DB</i> – If parties agree to a sole DB member, they shall jointly appoint the sole member by the date stated in the contract or, where the contract is silent, within 28 days of the effective date of the contract.  <i>Three Member DB</i> – If the DB is to comprise three members, each party shall nominate one member for approval

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					and send a copy of the report to each Party.	<p>the parties during the performance of the contract.</p> <p>The DB may on its own initiative raise an issue with the Parties in order to establish a dialogue between them and to clarify matters in the presence of the DB. The parties have the right to stop the DB's initiative if they regard it as unnecessary, provided that they notify the DB promptly, jointly, and in writing.</p> <p>If the DB is later called upon to make a determination concerning a matter which it has provided an informal advisory opinion, the DB shall not be bound by any views expressed in such verbal or written advisory opinions.</p>			<p>party's position along with any supporting evidence and the requested relief.</p> <p>The opposing party must submit a response to the position statement within 28 days of receipt.</p> <p>The referring party may reply to the response in writing within 14 days of receipt of the response.</p> <p>The parties and the DB must meet for a hearing within 21 days of the receipt of the response, unless the DB decides otherwise.</p>	Dispute Adjudication Boards are binding upon receipt and the parties shall comply with the decision without delay. Each party shall submit a written acceptance or rejection of the decision within 21 days of receipt. Decisions shall be admissible in any subsequent arbitration or judicial proceeding.	or, if the parties have agreed, the courts.		<p>by the other party. These two selected members shall select the third member, who, with the approval of the parties, shall act as chairperson. The DB composed of three members must be established by the date stated in the contract or, where the contract is silent, within 28 days of the effective date of the contract.</p> <p>In either the case of a single member DB or three member DB, if the parties cannot agree on the DB members, CIArb shall, after consulting the parties, appoint the DB member or members, or the whole DB if needed, within 28 days of the written request of one or both parties. An application to CIArb means an application to the President or the President's designated person.</p>
World Bank (2019 Update) <sup>4</sup>	Standard Bidding Documents	See FIDIC 2017	See FIDIC 2017	Either one sole member or three members.	See FIDIC 2017	See FIDIC 2017	See FIDIC 2017	See FIDIC 2017	See FIDIC 2017	See FIDIC 2017	See FIDIC 2017	See FIDIC 2017	See FIDIC 2017 provided that: (i) if the contract is

<sup>4</sup> The World Bank's July 2019 update to the Standard Bidding Documents Procurement of Works adopts the 2017 FIDIC Red Book General Conditions. As a result, subject to some minor modifications, the World Bank's approach to dispute boards mimics that of the 2017 FIDIC general conditions update.

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	Procurement of Works (July 2019)			For a Contract estimated to cost above USD 50 million, the DAAB shall comprise of three members. For a Contract estimated to cost between USD 20 million and USD 50 million, the DAAB may comprise of three members or a sole member. For a Contract estimated to cost less than USD 20 million, a sole member is recommended.									with a foreign contractor, the DB members shall not have the same nationality as the employer or the contractor; and (ii) the time period for appointment is 42 days (as opposed to 28)
NEC4	NEC4 Engineering and Construction Contract, Resolving and Avoiding Disputes, Option W3 (June 2017)	Dispute Avoidance Board	Standing	One or three DB members. The number of DB members must be specified in the NEC4 Contract Data.	The DB visits the site at intervals stated in the Contract Data unless the parties agree that a visit is not necessary. The DB may also make additional visits when requested by the parties.  The DB will prepare a note of their visit.	The DB assists the parties in resolving disputes before they become disputes. A <i>potential dispute</i> arising under or in connection with the contract is referred to the DB between two and four weeks after notification of the issue to the other party and the project manager. During site visits, the DB will review all potential disputes and help the parties	None stated	None stated	For the resolution of potential disputes, the parties will make available to the DB: (i) copies of the contract; (ii) progress reports; and (iii) any other material they consider relevant to any difference which they wish the DB to consider in advance of the visit to the site.	Non-binding recommendation.	Neither party is permitted to commence arbitration or litigation unless the potential dispute is first referred to the DB and, within four weeks of the date of the recommendation, a dissatisfied party notifies the other party of the matter which it disputes and states that it intends to refer it to arbitration or litigation.	No	<i>Single Member DB</i> – The parties will jointly appoint the single member of the DB.  <i>Three Member DB</i> – Each party will select a member of the DB and the third member of the DB will be selected jointly by the parties.  In either the case of a single member DB or three member DB, if the parties cannot agree on a DB member, either party may ask the “Dispute Avoidance Board nominating body” to choose the DB

Rules	Source	Dispute Board Type(s)	Ad hoc / Standing	Size of Board	Monitoring	Early Dispute Avoidance	Dispute Adjudication	Time Limits on Decisions or Recommendations	Procedure	Effect of Decision / Recommendation	Waiting Period/ Condition Precedent to Arbitration	Established List of Qualified Dispute Board Members	Method of Appointment
						to settle them without the need for the dispute to be formally referred. The DB can take the initiative in reviewing potential disputes including asking the parties to provide additional information.							member. The "Dispute Avoidance Board nominating body" is a third-party entity selected by the parties in the Contract Data.
Institution of Civil Engineers	ICE Dispute Board Procedure, Procedural Rules- Procedure One (April 2012)	Dispute Review Board; Dispute Adjudication Board; Dispute Conciliation Board	Standing	One or three DB members.  Unless agreed otherwise, the DB shall have three members.	Unless otherwise agreed by the parties, the DB shall visit the site at intervals not more than 120 days, including times of critical construction events, at the request of either party. Unless otherwise agreed by the parties and the DB, the period between consecutive visits shall not be less than 60 days, except as required to convene a hearing. At the conclusion of each site visit and within two weeks of leaving the site, the DB shall prepare a report on its activities during the visit.	None	If a dispute (of any kind whatsoever) arises between the parties under or in connection with, arising out of, the contract or the execution of the works, including any dispute as to any certification, determination, instruction, opinion, or valuation given under the contract, either party may at any time given notice of its intention to refer the dispute to the adjudication of the DB.	The DB must submit its reasoned decision within 84 days of the date the dispute is referred to the DB.	To refer a dispute to the DB, the referring party must submit a <i>notice of its intention</i> to refer the dispute. Within 14 days of the notice, either party may refer the dispute in writing to each member of the DB for its decision. The referral shall include a full statement of case and all necessary supporting documentation.  The DB may conduct a hearing on the dispute, in which it will decide on the date and place for hearing and may request written documentation from the parties prior to or at the hearing.	The decision shall be binding on both parties, who shall promptly give effect to it until it is revised by agreement, by an arbitral award, or a judgment of a competent court.  If either part is dissatisfied with the DB's decision, then either party may, within 28 days after receiving the decision, given notice to the other party of its dissatisfaction.  If either party fails to give a notice of dissatisfaction within the 28 day period after the release of a decision, then the decision shall become final and binding upon both parties.	Neither party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given.	Yes	<i>Single Member DB</i> – The parties may agree to the identity of the DB member in the case of a sole member DB.  <i>Three Member DB</i> – If the DB is to comprise three persons, each party shall nominate one member for approval by the other party. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chairman.  In either case of a single member DB or three member DB, if the parties cannot agree on the DB members, then the ICE will within 14 days upon the request of either party or both of the Parties, appoint the necessary members of the DB.